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MILITARY PENAL LAW: A BRIEF SURVEY OF THE 1920 REVISION OF THE ARTICLES OF WAR

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I. *Documents for Reference on American Courts-Martial in the War*

The following documents may be referred to for information on American courts-martial during the war and on recent proposals of amendment:

- (1) Hearings before the sub-committee of the Senate Military Affairs Committee, 66th Congress on S. 64, "A Bill to establish Military Justice" (1,395 pages).
- (2) Letter of March 10, 1919, from the Judge Advocate General to the Secretary of War, "Military Justice During the War."
- (3) Proceedings and report of the Special War Department Board on Courts-Martial and their Procedure, July 17, 1919 (the so-called "Kernan Board").
- (4) H. R. 13942, as reported by the House Military Affairs Committee, May 7, 1920.
- (5) The accompanying House Report, No. 940, May 7, 1920.
- (6) Hearings on the revision of the Articles of War before the House Military Affairs Committee, May 4, 1920.
- (7) H. R. 12775 as passed by the Senate, April 20, 1920 (embodying, as Chapter II, the revision of the Articles of War reported by the Senate sub-committee on Military Affairs).
- (8) Comparative Print of the Judge Advocate General's Proposed Revision (the new "Crowder Revision") submitted to the Senate sub-committee at the close of the hearings on S. 64 last December (December, 1919); which, in the guise of an amendment to S. 64, was, with few changes, adopted by the

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This lucid and concise statement was originally prepared and sent to a member of the Ohio bar in reply to a request for information as to the legislative and administrative changes of law made in consequence of the war-time experiences with courts-martial. By consent of the author, and of the judge advocate general, it is here printed for the first time. It should be widely read by the bar, for it gives the first general account of the results of the numerous legislative proposals, culminating in the Act of Congress of June 4, 1920 (Army Reorganization Act).

Colonel Rigby was on duty in Washington during 1918-19. In the spring of 1919 he was sent abroad to study British and French methods. He is presumably the best informed American officer upon British and French law and practice; and his experience in the military law division of the judge advocate general's office, and as a member of the Committee on Revision of the Manual for Courts-Martial, gave him complete information as to American practice.—Eds.]

Senate sub-committee, and thus ultimately embedded in the Act of June 4, 1920; this committee report being Chapter II of H. R. 12775 as passed by the Senate on April 20, 1920.

- (9) G. O. 88, War Department, July 14, 1919 (of which Paragraph 1 deals with return of records of trials for revision).
- (10) Changes in the Manual for Courts-Martial No. 5, July 14, 1919.
- (11) The new Manual for Courts-Martial (Edition of 1921), effective February 4, 1921.

In addition it will be noticed by reference to Pub. No. 242, 66th Congress (Army Reorganization Act) approved June 4, 1920, that the revision of the Articles of War has been embodied, as Chapter II, in that Act (41 U. S. Statutes at Large, 787, et seq.), substantially in the same form as in the House Bill, H. R. 13942 of May 7, 1920—i. e., substantially the revision recommended by the Judge Advocate General in his "comparative print" submitted to the Senate sub-committee last December.

II. *The Several Proposals of Amendment*

It is believed that a study of these documents will show a record of progressive substantial accomplishment upon the part of the Judge Advocate General and the War Department, contrasting very favorably with the purely destructive criticisms of some critics, and with the proposals to launch into wholly uncharted seas, contained in the now discarded so-called Ansell-Chamberlain (or Ansell-Johnson) bill (S. 64 as originally introduced, and H. R. 367).

1. Aside from minor matters, the Ansell-Chamberlain-Johnson bill contained three proposals of radical departures, which were wholly untried and untested by experience, not only in the United States Army, but in any other army which has succeeded in maintaining good discipline. Those three primary proposals, which are now discarded by Congress, were:

(a) *To place an unlimited number of enlisted men on every general and special court-martial.* It was proposed that every special court for the trial of an enlisted man should have at least one enlisted man in its membership, and every general court for the trial of an enlisted man, at least three enlisted men in its membership (S. 64 and H. R. 367, Arts. 5, 6). But the number of enlisted men on the courts was not restricted to the minimum, nor restricted to courts for the trial of enlisted men; but all soldiers, equally with officers, were to be made competent to sit on general and special courts (Art. 4). It would have been possible, for instance, under that bill, for eight privates to have been empaneled for the trial of their captain. Outside of the soviet armies, such an experiment has, so

far as the Judge Advocate General's office is able to ascertain, never been tried in any army of modern times.

(b) *To make the trial judge advocate* ("court judge advocate")—a lawyer—the *autocratic administrator of military discipline* through general and special courts-martial. It was proposed (Art. 12) to give him, not merely the powers of a civilian judge, but also the power (1) to appoint the court (from an indefinite "panel" to be named by the commanding officer, presumably to include everyone eligible for such duty in the command), (2) to rule finally on all questions of challenges, and on all other interlocutory questions arising during the trial, as well as on all questions of the admissibility of evidence, and to sum up the case both on the law and the facts at the conclusion of the trial, and then (3) to impose sentence at his own discretion (the function of the court being reduced to merely bringing in findings of "guilty" or "not guilty"), and thereupon (4) to exercise in his discretion the power of suspension of the sentence so imposed by himself.

The experiment of placing such autocratic power over the courts relied upon to enforce discipline and military justice in the hands of a lawyer, or of a subordinate staff officer, has never been tried, so far as I have been able to ascertain, in any army.

(c) *Lodging appellate power* (Art. 39) *over the sentences of summary and special courts-martial in staff judge advocates* (thus rendering them independent, as to their functions in relation to reviewing records of summary and special courts, of the commanding general to whose staff they are assigned) *and placing the appellate power over general courts-martial in a wholly civilian "Court of Military Appeals"* (Art. 52). This also is an experiment which has never been tried, so far as has been ascertained, in any modern army. In the British army, where the Judge Advocate General is a civilian, he acts in a purely advisory capacity, as the legal adviser to the Secretary of State for War, and reports through the Adjutant General who exercises the power to re-examine his recommendations (Hearings on S. 64, p. 375 et seq.). In other armies, where formal military courts of appeals are established, the court is composed either wholly or predominantly in time of war of military officers. In those armies where some civilian judges sit upon the court of appeals they are in the minority, so as, in effect, to act as legal advisers to the military officers in whose hands the final executive authority ultimately rests (Hearings, S. 64, pp. 547 to 559).

2. It is noteworthy that in General Ansell's address before the Ohio State Bar Association he did not dwell upon any of those outstanding features of the "Ansell Bill." He had apparently abandoned them. Instead, he dwelt upon the desirability of procedural changes which, in fact, had already before that time been embodied in regulations, or recommended by the Judge Advocate General in the proposed revision of the Articles of War submitted by the Judge Advocate General to the Senate sub-committee on Military Affairs last December

(1919), in connection with General Crowder's testimony before that committee (see the "comparative print" of the Judge Advocate General's proposed revision, as well as the Judge Advocate General's letter of March 10, 1919, to the Secretary of War, and the report of the Kernan Board of July 17, 1919); and many of which had been already administratively adopted upon the recommendation of the Judge Advocate General, by means of paragraph I of G. O. 88, War Department, July 14, 1919, and Changes No. 5 in the Manual for Courts-Martial, July 14, 1919 (documents above listed). These proposed changes or reforms were all of them matters about which no controversy existed at the time General Ansell made his address before the Ohio State Bar Association, and about which there never had been any real controversy. They were the results of experience during the World War, concerning which everybody who had studied the subject was in practical agreement; and which it was, at the time of General Ansell's address, almost a foregone conclusion would be approved by the Senate sub-committee then studying the question, and which, in fact, were recommended by that committee and embodied in the bill as passed by the Senate April 20, 1920 (document above listed), and in the bill reported by the House Military Affairs Committee May 7, 1920 (H. R. 13942), and were enacted into law as Chapter II of the Army Reorganization Act of June 4, 1920.

3. General Ansell was tilting at a man of straw. It was to be expected that the unusual experiences of the World War, wherein upwards of 200,000 new officers were commissioned in the service, necessarily with brief training, and nearly 4,000,000 men were suddenly called into the army, would develop some defects in the system of administering military justice. As General Crowder said in his testimony before the Senate Military Affairs Committee, October 24, 1919 (hearings on S. 64, p. 1134):

"Of course, no one thinks we have come out of this unprecedented World War without knowing that there are many respects in which the existing Code may be improved. I recognize the necessity for revision, and I hope to be able to place before the committee, as I progress in my remarks, much needed amendments to the existing Code."

The wonder is, not that defects in the system were developed under such unprecedented circumstances, but rather that the defects proved so few. On the whole it may be said (without forgetting that

NOTE—Most of which General Ansell could himself have put into effect, administratively, while he was acting Judge Advocate General, had he been so disposed, instead of letting things drift so as to make fuel for agitation.

there were some unduly severe sentences, and some other failures) that the system worked well. A great army was quickly disciplined; and indeed raised within a few months to such a high point of discipline that, when the test came at the front, not only did the army do its duty magnificently, but the relative number of courts-martial was less than in ordinary peace times, and it proved not to be necessary to carry the death sentence into effect even a single time for a military offense. That is a record which is believed to be unprecedented in history, with a large army. As said by the Kernan Board (Report, July 17, 1919, p. 13; document No. 3 of those above listed) :

"From the foregoing discussion it will be apparent that, in the opinion of this board, the existing court-martial system is fundamentally sound and well calculated to serve successfully the ends for which it was created. It is an evolution representing constant change and growth. No claim is made that it is a perfect system; rather it is definitely admitted that in the light of experience changes may be made now in the direction of improvement. Under it errors in the proceedings, the findings, and in the measure of punishment occur from time to time. This has always been so and will always be so in some measure. But this is not peculiar to the court-martial; it is true of all agencies created and administered by man. Military justice is carried out at all times under great urgency and stress, where the nice deliberation and finish of the civil procedure is utterly impossible."

III. *The Changes Now in Force*

The aim kept in mind by the Judge Advocate General in preparing the present Revision of the Articles of War, which has now been embodied into law in the Act of June 4, 1920, was to make such changes in the previously existing system as were dictated by experience, while at the same time holding fast to ancient principles which had proven their value. It is, of course, not claimed that the present revision is perfect, but it is believed that, without venturing into the field of untried experiment, the chief defects revealed by the experiences of the World War have been remedied.

The outstanding changes made by the present law (Code of 1920) are the following:

1. Enlisted men placed on a parity with officers in preferring charges; but all charges must be verified by affidavit (A. W. 70).
2. Stricter requirements concerning preliminary investigation of charges; and, in particular, the requirement (adopted from the British practice where it has been tested and proven by experience) that at the preliminary investigation full opportunity shall be given to the accused to cross-examine witnesses against him, if they are available (A. W. 70).

3. Embodiment in mandatory statutory form of the present regulation (C. M. C. M. No. 5, July 14, 1919, par. 76a) that before directing the trial of any charge by general court-martial the appointing authority will refer it to his staff judge advocate for consideration and advice (A. W. 70, par. 3).

4. Making an officer responsible for unnecessary delay in investigating or carrying a case to final conclusion punishable as a court-martial may direct (A. W. 70, par. 4).

5. Placing enlisted men upon the same footing as officers, as to the regulation against placing a person charged with minor offenses in confinement; substituting arrest for confinement in such cases for enlisted men, as well as for officers (A. W. 69).

6. Encouraging the use of "company punishment," instead of resort to summary court-martial, for minor offenses (A. W. 104).

7. Mandatory appointment of defense counsel (and for general courts, assistant defense counsel, corresponding to assistant trial judge advocates) in the order convening the court, in like manner as trial judge advocates and their assistants (A. W. 11), so as to assure the defense the same footing as the prosecution before the court; while at the same time allowing accused the right to have his own counsel, in addition, should he so desire (A. W. 17).

8. The provision of a "law member" for every general court-martial (A. W. 8, par. 2), with power to rule on all interlocutory questions, except challenges, subject (except as to rulings on the admissibility of evidence) to an appeal to the court itself (A. W. 31), substantially like the law member of the British field general courts-martial (Hearings S. 64, pp. 390, 394-396, 408, 414, 461-462, 478-481, 502-503). A system which has proven its value by British experience during the war.

9. Embodying in mandatory statutory form (A. W. 46) the requirement theretofore (on the recommendation of the Judge Advocate General) put into the Manual for Courts-Martial (Changes No. 5 M. C. M., July 14, 1919, document No. 10 of those above listed, par. 370) that every record of trial by general court-martial or military commission received by a reviewing or confirming authority must be referred by him, before he acts thereon, to his staff judge advocate or the Judge Advocate General.

10. Adopting the recommendation of the Judge Advocate General in his letter of March 10, 1919, to the Secretary of War (document No. 2 of those above listed, pp. 63, 64) that the words "in time of peace" be stricken out of the 45th Article of War, so as to "enable the President to fix the maximum limits of punishment in war as well as peace." It is believed that this amendment is a prime improvement, permitting the President, by executive order, in time of war as well as in time of peace, to control the maximum sentences imposable by courts-martial for different offenses and under varying conditions.

11. Embodying in statutory form (A. W. 40) the prohibition, which had already been made by General Order, on the recommendation of the Judge Advocate General (G. O. 88, War Department, July 14, 1919, par. 1, document No. 9 of those above listed) against (a) returning an acquittal for revision, and (b) increasing the severity of sentences upon revision.

12. Provides for a new trial in proper cases (A. W. 40, 47, 49, 50½).
13. Requires a unanimous vote for death sentences; three-fourths vote to impose life imprisonment or confinement for more than ten years; and two-thirds vote for all other convictions and sentences.
14. Provides a complete system of appellate review for all general court-martial cases (A. W. 50½).
15. Provides greater flexibility in the suspension of sentences (A. W. 52), whereby the benefits of the British "Cat and Mouse Act" may be had, under which the British authorities saved to the colors between 30,000 and 40,000 soldiers during the war. (Statement of Gen. Childs, British Deputy Adjutant General; Hearings, S. 64, pp. 457-458).

Other changes are in the direction of better administration and greater flexibility; as for instance, the amendments to A. W. 5 and 6, doing away with the maximum limits of the number of members for general and special courts-martial; the change in A. W. 18, allowing each side one peremptory challenge (but the law member of the court is not to be challenged except for cause), the change in nomenclature of "judge advocate" to "trial judge advocate," to avoid possible confusion with the staff judge advocate; and other changes of minor importance.

It may be proper to add that in considering army court-martial sentences during the war, not only should the emergent circumstances be borne in mind, but the indeterminate character of the sentence should be remembered—that it is only the expression of the maximum limit of a term which has no minimum (hearings, S. 64, pp. 1153, et seq.). Thus, a nominal sentence to 25 years' confinement might, and in some cases did, result in less than six months' actual confinement, with honorable restoration to the colors thereafter (hearings, S. 64, pp. 438, 523). So true was this in practice that the average term actually served by men eventually found worthy of restoration to the colors was only .49 of a year, or less than six months (Ib. pp. 689, 1154), and the average of all terms actually served (including both those of the men found worthy of restoration and those not proving themselves fit therefor) was but 1.06 years in the disciplinary barracks, and 2.94 years in the penitentiary (Ib. p. 688). Further, the figures show that at the end of the war, August 30, 1919, there were only 855 men remaining in confinement in penitentiaries, and 3,728 in the various disciplinary barracks, or a total of 4,583 then in confinement under sentence of courts-martial; which was but 643 more men in the penitentiaries and only 1,627 more in the disciplinary barracks, as a result of the mobilization of the army of 4,000,000 men, than there were on April 6, 1917 (statistics, p. 688, hearings on S. 64).